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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

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9 Leroy Montoya,) No. CV 11-8124-PCT-JAT-ECV

10 Plaintiff,) **ORDER**

11 vs.)

12)

13 Charles L. Ryan, et. al.,)

14 Defendant.)

15

16 Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus. The

17 Magistrate Judge to whom this case was assigned issued a Report and Recommendation

18 (R&R) recommending that this Court deny the Petition. Petitioner has filed objections to the

19 R&R.

20 **I. Review of Report and Recommendation**

21 This Court "may accept, reject, or modify, in whole or in part, the findings or

22 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). It is "clear that the

23 district judge must review the magistrate judge's findings and recommendations *de novo* if

24 *objection is made*, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121

25 (9th Cir. 2003) (*en banc*) (emphasis in original); *Klamath Siskiyou Wildlands Ctr. v. U.S.*

26 *Bureau of Land Mgmt.*, 589 F.3d 1027, 1032 (9th Cir. 2009) (the district court "must review

27 *de novo* the portions of the [Magistrate Judge's] recommendations to which the parties

28 object.").

1 The Petition in this case was filed under 28 U.S.C. § 2254 because Petitioner is
2 incarcerated based on a state conviction. With respect to any claims that Petitioner exhausted
3 before the state courts, under 28 U.S.C. §§ 2254(d)(1) and (2) this Court must deny the
4 Petition on those claims unless “a state court decision is contrary to, or involved an
5 unreasonable application of, clearly established Federal law”¹ or was based on an
6 unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).
7 Further, this Court must presume the correctness of the state court’s factual findings
8 regarding a petitioner’s claims. 28 U.S.C. § 2254(e)(1); *Ortiz v. Stewart*, 149 F.3d 923, 936
9 (9th Cir. 1998). If Petitioner failed to exhaust a claim before the state courts (and is now
10 barred from exhausting the claim resulting in a procedural default of the claim) this Court
11 must decline to reach the merits of that claim unless Petitioner shows cause and prejudice to
12 excuse that procedural default. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). However,
13 “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding
14 the failure of the applicant to exhaust the remedies available in the courts of the State.” 28
15 U.S.C. § 2254(b)(2)(emphasis added).

16 In his Petition, Petitioner raises two theories for habeas relief: 1) that he received
17 ineffective assistance of counsel, and 2) that the bid system for obtaining indigent counsel
18 in Mohave County “regarding allowable case loads” violated his state and federal rights.
19 (Doc. 1 at 7). This Court will review the theories on which Petitioner filed an objection de
20 novo.

21 **II. Factual Background**

22 As recounted in the R&R, Petitioner brings this Petition to challenge his conviction
23 for theft, stemming from his alleged rental of a carpet cleaner and failure to return it. R&R
24 at 1-2. In his Objections, Petitioner does not dispute the recounting of the background in the
25 R&R at pages 1-7; accordingly, the Court accepts and adopts this factual background.

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27 ¹ In applying federal law the state courts only need to act in accordance with Supreme
28 Court case law. *See Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

1 **III. Ineffective Assistance of Counsel**

2 Petitioner claims his trial counsel was ineffective. Petitioner identifies ten issues that
3 fall into two general categories: 1) counsel's pretrial investigation was inadequate; and 2)
4 counsel's strategy was inadequate.

5 Generally, under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, "[a]n
6 ineffective assistance claim has two components: A petitioner must show that counsel's
7 performance was deficient, and that the deficiency prejudiced the defense. To establish
8 deficient performance, a petitioner must demonstrate that counsel's representation fell below
9 an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)
10 (internal citations and quotations omitted). A deficient performance is one that is "outside
11 the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. In order
12 to show prejudice, Petitioner "must show that there is a reasonable probability that, but for
13 counsel's unprofessional errors, the result of the proceeding would have been different. A
14 reasonable probability is a probability sufficient to undermine confidence in the outcome."
15 *Strickland*, 466 U.S. at 694. Without specifics that cause the court to have such doubts, a
16 claim of ineffective assistance of counsel must be denied. *See James v. Borg*, 24 F.3d 20,
17 26 (9th Cir. 1994) (noting that petitioner needs to "identify what evidence counsel should
18 have presented" to show his innocence).

19 **A. Adequacy of Counsel's Investigation**

20 "Counsel has a duty to make reasonable investigations or to make a reasonable
21 decision that makes particular investigations unnecessary." *Strickland*, 466
22 U.S. at 691. We evaluate the scope of the duty to investigate in light of the
23 context of trial. "In any ineffectiveness case, a particular decision not to
investigate must be directly assessed for reasonableness in all the
circumstances, applying a heavy measure of deference to counsel's
judgments." *Id.*

24 *Hovey v. Ayers*, 458 F.3d 892, 909 (9th Cir. 2006).

25 In his Objections, Petitioner contends that counsel failed to locate and interview
26 potential witnesses. Objections at 12. Trial counsel is not required to interview every
27 possible witness to be effective. *See generally Bobby v. Van Hook*, 558 U.S. 4, 9-12 (2009).
28 Furthermore, Petitioner offers nothing but his own conclusions and allegations to argue that

1 his counsel did not investigate the case. Petitioner's speculation about what counsel
2 allegedly did not do cannot support an ineffective assistance of counsel claim. *See Grisby*
3 *v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997).

4 Petitioner also contends that the Incident Report Form (Doc. 34 at 39) was falsified
5 and that counsel could have proven this if counsel had investigated and if PSA Briggs had
6 testified. Objections at 6. Petitioner alleges that PSA Briggs was not a police officer, and
7 that her Incident Report Form contained inaccurate information about Petitioner's Gemstone
8 Avenue address, specifically information which could only have been known months after
9 the October 18, 2006 incident with the carpet cleaner had occurred. Objections at 6-9.
10 Briggs is a Police Service Aide (badge number A238) who took Petitioner's statement
11 regarding the stolen carpet cleaner at the Bullhead City police department. Doc. 34 at 21.
12 While this Court cannot determine on exactly what date the Incident Report Form was
13 completed, the statement at the bottom seems to indicate that the report was updated in
14 February 2007. Thus, the Gemstone Avenue address is consistent with where Petitioner was
15 living in early 2007 and does not indicate that the report was falsified. Petitioner also
16 compares the Incident Report Form to his Victim Rights Request Form (Doc. 34 at 21) to
17 argue that the Incident Report Form was falsified. Objections at 7-9. The Victim Rights
18 Form is only signed by Petitioner and contains information provided by the Petitioner to PSA
19 Briggs. It is not an official police report; thus, any discrepancy with the official Incident
20 Report Form does not constitute a dispute of fact or a falsified document. Because
21 Petitioner's arguments do not establish any basis to call the documents into question,
22 counsel's alleged lack of investigation and decision not to have PSA Briggs testify were not
23 deficient performance.

24 **B. Adequacy of Counsel's Strategy**

25 In cases where a counsel's strategy is challenged, this Court "will not second-guess
26 such decisions or use hindsight to reconstruct the circumstances of counsel's challenged
27 conduct." *Mancuso v. Olivarez*, 292 F.3d 939, 954-55 (9th Cir. 2002); *Guam v. Santos*, 741
28 F.2d 1167, 1169 (9th Cir. 1984) ("tactical decisions by counsel with which the defendant

disagrees cannot form the basis of a claim of ineffective assistance of counsel”).

In his Objections, Petitioner contends that counsel failed to ensure that Abraham Parra-Rodriguez, Andrew Parra-Rodriguez, Norma Rodriguez, and Randy Fisher testified at trial. Objections at 9-12. A petitioner may not use self-serving speculation to argue that a witness might have had favorable testimony. *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997); *United States v. Ashimi* 932 F.2d 643, 650 (7th Cir. 1991). Petitioner states that the witnesses’ testimony would establish that the carpet cleaner was stolen and was found at the Parra-Rodriguez residence. Objections at 11. However, Petitioner also states that counsel believed the witnesses would invoke the Fifth Amendment, and that they would not be good witnesses because they were gang members with criminal records. *Id.* In addition, Petitioner’s Ex. G states that counsel’s theory of the case was that Petitioner’s failure to return the carpet cleaner was an oversight, not a theft. Doc. 34 at 34. Under counsel’s strategy, the witnesses’ testimony would not have been necessary, and the Court will not second guess counsel’s strategic decisions.

Petitioner also objects to counsel’s failure to: 1) introduce testimony regarding Police Officer Alan Harrison’s discussion with the store manager, Mr. Criss, about suing Petitioner in civil court; and 2) admit evidence that the carpet cleaner’s owner Bill Higgins’s small claims suit against Petitioner was dismissed. Objections at 12. The R&R states that Petitioner did not show how the outcome of the trial would have been different if this testimony and evidence had been introduced by counsel. R&R at 12. In his Objections, Petitioner contends that not including this testimony prevented the jury from “experienc[ing]” Petitioner’s case. Objections at 13. However, this objection does not show that Petitioner was prejudiced by counsel’s failure to admit this evidence. Accordingly, this objection does not establish that counsel’s performance was deficient.

IV. Mohave County Bid System

Petitioner does not object to the R&R’s analysis of Petitioner’s claim that there are problems with the Mohave County Bid System; therefore, the Court accepts and adopts the conclusion of the R&R that this claim does not warrant habeas relief. R&R at 13.

V. Request for Evidentiary Hearing

In the title of his Objections, Petitioner requests an evidentiary hearing. However, in the objections themselves, Petitioner does not specify what evidence is available that warrants an evidentiary hearing. Under 28 U.S.C. § 2254(e)(2), a petitioner is entitled to an evidentiary hearing if he presents a “meritorious claim” and he exercised reasonable diligence in developing the factual record in the state proceedings. *Williams v. Taylor*, 529 U.S. 420, 434-37 (2000). A petitioner exercises the diligence necessary to preserve a claim if “the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.” *Id.* at 435.

Thus, in order to qualify for an evidentiary hearing, Petitioner must both: “(1) allege facts which, if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding.” *Belmontes v. Brown*, 414 F.3d 1094, 1124 (9th Cir. 2005). No hearing is necessary, however, if this Court “is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial” *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991); *see also Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir. 1994) (In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court.).

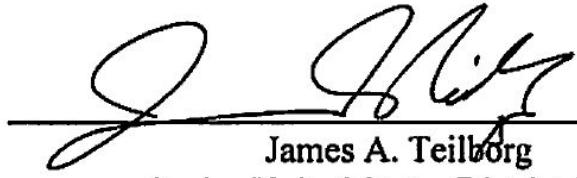
In his Objections, Petitioner alleges that there was testimony that would have supported the defense, but he does not offer any specific information regarding what that testimony would have been. The Court finds that Petitioner has not made any allegations that, if true, would warrant habeas relief. Accordingly, the Court will not conduct an evidentiary hearing.

VI. Conclusion

IT IS ORDERED that the Report and Recommendation is accepted and adopted (Doc. 30), the objections are overruled (Doc. 34), the Petition in this case is denied, with prejudice, and the Clerk of the Court shall enter judgment accordingly.

1 **IT IS FURTHER ORDERED** that pursuant to Rule 11 of the Rules Governing
2 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
3 certificate of appealability and leave to proceed *in forma pauperis* on appeal because
4 Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28
5 U.S.C. § 2253(c)(2).

6 DATED this 25th day of June, 2013.

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11 James A. Teilborg
12 Senior United States District Judge
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